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ABSTRACT

The Federal Communications Commission (FCC) has long had rules that prohibit anyone from owning more than one television station in any given location. Two of the stated purposes behind the FCC's anti-monopoly rules are to foster diversity of programming for the sake of First Amendment interests, and to promote programming among media outlets in every market, objectives which the anti-monopoly rules may actually frustrate. Given the FCC's Table of Allocations, this rule has no effect on the number of stations currently operating in large markets; but this was not always true, nor is it true today in at least some small markets. So far as "diversity" is concerned, it becomes extremely difficult to conceptualize how one would regulate "in the public interest" because of the multitude of theoretically, although not empirically, incomparable dimensions that belong to the domain of diversity. The argument of this paper is that pure theory has gone about as far as it can go, and that an infusion of data will be required in order to complete the description of what a desirably diverse world of programming would look like. It is argued that those data could be produced easily and cheaply if the FCC changed its anti-monopoly rules to make them fuzzier and more standard-like than they currently are. (GL)

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DIVERSITY OF VOICE?

THE FCC'S BRIGHT-LINE "ANTI-MONOPOLY" RULE

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I. INTRODUCTION

The Federal Communications Commission has long had rules that prohibit anyone from owning more than one television station in any given location.2 One of the stated purposes behind the FCC's anti-monopoly rules is to foster diversity of programming for the sake of First Amendment interests3 as well as in order to promote programming competition among media outlets in every

1. The authors gratefully acknowledge comments made on an early draft of this article by Thomas W. Hazlett, Fred S. McChesney, Glen O. Robinson, Matthew L. Spitzer, James G. Webster, and Steven S. Wildman. Remaining errors are the sole property of the authors.

2. See 47 C.F.R., Section 73.3555(a)(3).

3. See 49 FED. REG. 19483 (1984); Multiple Ownership Rulemaking, 18 F.C.C. 288, 291 (1953). The other principal motivation claimed for the anti-monopoly rules is the more traditional antitrust policy that those who possess concentrated economic power might attempt to restrict the output of the product they sell, in this instance advertising. But the FCC has jealously guarded the prerogative to restrict the output of advertising -- which is what its own commercialization standards, and the unchallenged agreements among members of the National Association of Broadcasters, are designed to do.

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market,4 objectives which the anti-monopoly rules may actually frustrate. Given the FCC's Table of Allocations, this rule has no effect on the number of stations currently operating in large markets; but this was not always true, nor is it true today in at least some small markets. Even if one approaches this issue solely as an historical study, it would shed light on the modus operandi of the FCC and other regulatory agencies. But even in markets where the number of stations in operation is the maximum allowed by the Commission's Table of Allocations, the nature of programming is affected by the anti-monopoly rule, as is the rate at which technological and programming innovation spreads through the industry. Of course, the rule was meant to affect programming, but not necessarily in the way that has actually occurred.

So far as "diversity" is concerned, it turns out to be extraordinarily difficult to conceptualize how one would regulate "in the public interest," because of the multitude of theoretically, although not empirically, incomparable dimensions that belong to the domain of diversity. The argument of this paper is that pure theory has gone about as far as it can go, and that an infusion of data will be required in order to complete the description of what a desirably diverse world of programming would look like. We

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4. E.g., Harvey L. Zuckman, Martin J. Gaynes, T. Barton Carter, Juliet Lushbough Dee, MASS COMMUNICATIONS LAW 398-400 (3d ed. 1988).

argue that those data could be produced easily and cheaply if the FCC changed its anti-monopoly rules in the way we will suggest, making them fuzzier and more standard-like than they presently are.

The nub of the problem, we argue, is that the FCC has employed a "bright line" rule where a fuzzy one -- something more like what has been called a "standard" -- would have done a better job. In this context, bright-line rules, what Carol Rose calls "crystals,"5 are liable to deliver the wrong results. The place for bright line rules is to protect the interests of people who, in the absence of such rules, could not finally determine the outcome of their disputes regarding a certain resource prior to investing in its creation and development. Better outcomes could be teased out of "muddy" rules -- Rose's terminology again -- where, as is true in this context, an investor could determine with some certainty what his entitlement in the resource would be before he was obliged to invest much money in creating or developing it.6

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5. Carol M. Rose, Crystals and Mud in Property Law, 40 STANFORD LAW REVIEW 577 (1988).

6. Any entitlement is appropriately muddy early in its natural history; rules will become more and more crystalline as the entitlement and the environment in which it proves valuable evolves into a more determinate form. This is an implication of Harold Demsetz's Toward an Economic Theory of Property Rights, 57 AMERICAN ECONOMIC REVIEW PAPERS AND PROCEEDINGS 347 (1967).

Our paper assumes the administrative law route to establishing television channels, in which the FCC holds hearings, meditates, and then prepares a table of

Neoclassical economists should be forewarned that such a situation, where there is much theory but few conclusions that can be drawn from it, is the proper lair of Austrian economists, one of whose principal themes is the limitation of pure theory as a lodestar for public policy. There are simply too many variables to solve for, and too much undiscoverable private information that would have to be discovered, to permit a theoretical resolution of the relationship between market structure and programming diversity. In such circumstances, one wants, not a bright-line rule, but a fuzzy one, with enough short-run flexibility to generate the data that are required in order to reach appropriate long-run decisions.

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allocations that integrates its best guess about what the public interest, convenience and necessity requires in the way of allocations. In The Federal Communications Commission, 1 JOURNAL OF LAW AND ECONOMICS 1 (1959), Ronald Coase argued that markets would do a better job of allocating electromagnetic spectrum than would an administrative agency -- something that is evidently being permitted to occur in the United Kingdom at the moment. See FINANCIAL TIMES, Monday Feb. 20, 1989, at p. 16. We are persuaded by Coase, but our project here is less grand than to imagine a broadcasting world starting anew. We therefore take the reality of administrative government as given, and ask whether the agency could modify its rules in a relatively modest way in order to improve the world.

See also, Arthur S. DeVany, Ross D. Eckert, Charles J. Meyers, Donald J. O'Hara, and Richard C. Scott, A Property System Approach to the Electromagnetic Spectrum, 21 STANFORD LAW REVIEW 1499 (1969); Severin Borenstein, On the Efficiency of Competitive Markets for Operating Licenses, 102 QUARTERLY JOURNAL OF ECONOMICS 357 (1988).

II. THE EFFECT OF MARKET STRUCTURE ON DIVERSITY

A. Literature

A scholarly literature has grown up contrasting the diversity effects of maximally competitive local television markets versus monopolized local markets. In 1952, Peter Steiner argued that a monopolistic structure would produce more "diversity" -- in at least one sense of diversity -- than would occur with other industry structures.7 In a multistation competitive market, Steiner argued, stations have the incentive to fragment the most populous segments of the market while leaving peripheral tastes and interests underserved, if served at all. That occurs because no station has the incentive to take into account the impact of its own programming plans on the profitability of competing stations. So far as one station is concerned, its impact on its competitor is an externality. A multi-station monopolist, on the other hand, would internalize that sort of externality.8 Accordingly, the monopolist has an

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7. Peter O. Steiner, Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting, 66 QUARTERLY JOURNAL OF ECONOMICS 194 (1952).

8. In the absence of antitrust laws, however, monopolists and competitors would arrive at the same programming (assuming transactions costs could be neglected), given that the number of outlets in a market is fixed by the FCC's Table of Allocations. That is a prediction of the Coase theorem -- competitors, if they were free to do so, would internalize externalities by contracting with one another. The problem Steiner identified may thus be seen as one of antitrust policy more broadly construed. It is not unique to the broadcast market, but would occur in any industry with multiple firms and product

incentive to make programming plans designed to invite the attention of a broader spectrum of the public.

But there are problems with Steiner's idea of diversity. A monopolist is not concerned with maximizing viewer welfare, but with maximizing the size of its audience. Its incentive is thus to put on programs with a value to each audience-member that is greater than zero, but not necessarily much greater. Although Steiner's model indicates that monopolists will have an incentive to spread out programming choices to a greater degree than competitors would do, one cannot therefore conclude that the listeners would be better off. The value of the programming to the listener who lies just inside the preference boundary between each adjacent pair of programs could approach zero. The "boundary listener" would be better off if the program selections were squeezed together somewhat more, because the program received would then be closer to the one most preferred. But consumers of radio do not pay for programming, advertisers do. And advertisers would not obviously be better off if the programming were thus squeezed, because the boundary listener would be listening to the advertising messages in any case.

differentiation, and where scale economies had not been exhausted. See, Lester G. Telser, On the Regulation of Industry: A Note, 77 JOURNAL OF POLITICAL ECONOMY 937 (1969).

Steiner's model, which implicitly adapted to radio the earlier work of Harold Hotelling,9 suggested that maximally competitive programming will tend to be too uniform. But it may also be true that the number of programming services a monopolist provides will be too few and perhaps not uniform enough.

Michael Spence and Bruce Owen approached Steiner's model with the recognition that it is not only important how many listeners or viewers place a positive value on particular programming; the magnitude of that value also matters.10 Spence and Owen were able to show that Steiner's conclusion, that monopoly is inevitably the more diversity-enhancing structure for the broadcasting industry, was subject to a compelling qualification. Given certain assumptions, maximally competitive local industry structures generate greater listener/viewer welfare than monopolistic ones would. But given somewhat different assumptions, a monopolized market will do better. Lacking a means of deciding which assumptions ought to be used, Spence and Owen are unable to ascertain unambiguously which of these two market structures to prefer.

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9. Harold Hotelling, Stability in Competition, 39 ECONOMIC JOURNAL 41 (1929).

10. Michael Spence and Bruce Owen, Television Programming, Monopolistic Competition, and Welfare, 91 QUARTERLY JOURNAL OF ECONOMICS 103 (1977).

Several commentators have followed Spence and Owen; but the inability to choose between the two market structures persists in the literature.11 It is not an accident, we argue, that scholars have been unable to move beyond this impasse. The problem is that the notion of diversity is too complicated. There is no general agreement even about what "diversity" means, let alone how it should be traded off with other desiderata such as quality.12

And widening ones viewpoint only makes the problem more difficult, because more diverse offerings in one medium tend to "crowd out" at least some of the "diverse" offerings of other media. Efficient diversity almost certainly will best be realized through diversity between video and other media rather than simply among video offerings considered in isolation from the rest of life.

Taking a narrow perspective, increasing any dimension of diversity ought to be unambiguously a good. More broadly considered, however, increasing diversity in one aspect decreases it in others -- in other words, brings a bad along with it. Possessing no means to directly observe

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11. E.g. Jack H. Beebe, Institutional Structure and Program Choices in Television Markets, 91 QUARTERLY JOURNAL OF ECONOMICS 15 (1977); Steven S. Wildman and Bruce M. Owen, Competition and Multichannel Bundling, in VIDEO MEDIA COMPETITION 246-248 (Eli M. Noam, ed. 1984); Eli M. Noam, A Public and Private-Choice Model of Broadcasting, 55 PUBLIC CHOICE 163 at 177 (1987).

12. Steven S. Wildman and Nancy Y. Lee, Program Choice in a Broadband Environment (manuscript)(1989).

people's welfare, there is no way to know whether on balance the world is better off or worse off after the diversity-laden change. We could, however, have a proxy for directly observing happiness, namely, how people's demand for the output of the broadcast media is affected by alternative market structures. However, if we must limit attention only to the two polar structures that have received theoretical consideration so far, while limiting observation only to the single pole that the FCC's anti-monopoly rules permit, a flawed understanding of the problem is apt to emerge.

There are intermediate structural possibilities available in many permutations that have been essentially ignored, both by scholars and by policymakers. For example, existing discussions of a hypothetical n-channel market contrast what would happen if one firm operated all n channels, versus what would happen if n firms operated one channel each. No one has asked what would happen if (for example) in a twenty-channel market, each of four firms operated five channels, or, for that matter if one firm operated eight channels, one firm operated four and eight firms operated the rest. And there are many other variations on this theme. Given the inability of scholars to ascertain theoretically that either maximal competition or outright monopoly is an economically optimal structural configuration, one must seriously consider the possibility that one of the many other structural options is better than either extreme.

B. Mating Problems

The literature following Steiner considers the impact of different possible market structures on synoptic variables only. It should be recognized, however, that if these variables are considered dynamically, a near parallel set of concerns is presented. The broadcasting industry has many "mating" problems13 such as: In 1920, why would anybody buy a radio if there were no radio stations on the air? But why would anybody put a radio station on the air unless they could sell advertising or generate revenues in some other fashion? And why would anyone buy advertising time if nobody had a radio? Another example: In 1955, why would anybody buy a UHF television tuner if there were no UHF television stations on the air, etc.? Or: In 1993, why would anybody buy a high-definition television receiver if there won't be high-definition signals to receive, etc.?

There are a number of different ways to solve mating problems, but one of the best-established is by investing a

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13. Mating problems occur whenever diverse individuals, who are unrelated to one another through any formal market mechanism, must co-ordinate their utilization of resources in order for optimal production to occur. Mating problems arise when two or more distinct sorts of technological innovation require one another. Automobiles and gasoline are examples of mated products, as are cans and can-openers, and so on. See generally, Dale T. Mortensen, Property Rights and Efficiency in Mating, Racing, and Related Games, 72 AMERICAN ECONOMIC REVIEW 968 (1982).

In many industries mating problems are not very serious and do not merit study. In broadcasting, however, such problems have frequently proved to be very important.

legal monopoly with exclusive rights that allow it to use one of the mated products (e.g., radio programs) as a loss-leader for another (e.g., future license fees or advertising revenues). Thus, once the BBC obtained a monopoly on radio transmissions throughout the United Kingdom, it had a strong incentive to seek whatever services would make its monopoly more desirable to listeners and more valuable to itself.14 The ability to exclude cream skimmers, in futuro, resolves what might otherwise constitute a counterincentive to innovation, namely, the possibility that free riders will poach on innovators' unprotected inspirations. A range filled with free riders is one on which everyone has the incentive to let someone else make useful investments. Useful change happens more slowly under such circumstances.

Forming a monopoly to resolve the mating problem, however, is not necessarily an attractive solution. Although it might solve the mating problem, monopoly would make other matters worse: it might provide excessively diverse programming, a possibility recognized by Spence and Owen and their followers, and would surely damage competition in the advertising market to a greater or lesser extent.

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14. In the U.S., RCA established NBC to produce radio programs at a loss in order to facilitate the sale of RCA radios at a gain. It paid RCA to do this because of their ownership of several patents on receiver components, which they marketed either under their own brand or through license to other manufacturers. In order for RCA to have a sufficient (if not optimum) incentive to solve the mating problem, it was not necessary for them to have a monopoly in the broadcasting market.

C. Other Diversity Values

It is easier to say what diversity is not than what it is. Various narrow versions of broadcast diversity have appeared in different connections. There is the diversity of Section 307 of the Communications Act, which ensures that the entire broadcast industry will consist of numerous locally-based operators rather than a few nationally-based broadcasters. There is the production diversity that is supposedly served by the Network Syndication rules and the Prime Time Access Rule -- all designed to assure that many different entities will be in the business of producing entertainment programs. There is the diversity of access mentioned by Wildman and Owen,15 that would allow individuals the opportunity to participate effectively in public debate by letting them address mass audiences through mass media of communications. None of these, we think -- however worthy it might otherwise be -- has much relevance to the anti-monopoly rules.16

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15. Steven S. Wildman and Bruce M. Owen, Competition and Multichannel Bundling, in VIDEO MEDIA COMPETITION 246-248 (Eli M. Noam, ed. 1984).

16. Moreover, the diversity interest of Section 307 is actually two senses of diversity wrapped into one. First, there is what may be called regional diversity -- the idea that each local region will have its own broadcast industry concentrating on local tastes, news and so on. Second, Section 307 stands for the notion that broadcast resources should be placed in many different hands. Five individuals each owning one hundred percent of one of five stations does, indeed, yield diversity of ownership. But so also would five individuals each owning twenty percent of one firm that owned all five stations. Hence we can dismiss these senses of diversity as irrelevant to our concerns.

Diversity of participation in the program production industry is similarly irrelevant. Virtually all programming shown on local stations, other than the news and the occasional "children's circus" show, is produced elsewhere, by entities independent of stations. How many such producers there will be does not obviously correlate with anti-monopoly rules, one way or the other.

"Diversity" as it pertains to public affairs programming is perhaps a more difficult subject, one that does not so obviously decompose into a purely utilitarian inquiry. The consumption of public affairs programming may well be a cost to many consumers, rather than a benefit -- even if it is a cost which (or so someone might argue) conscientious citizens ought to be glad, or anyway obliged, to bear. Even though it is certainly true that <u>any single citizen</u> may be better off sloughing off the citizen's obligation to stay conversant with public affairs (so long as everyone else is keeping up, one person's slacking won't make a difference: if everybody else is slacking, one person's keeping up won't make a difference either), the <u>community</u> will not be better off if everyone slacks. Running a democracy requires an informed citizenry and, no doubt, a certain amount of coercion as well.

Nevertheless, we think that diversity of ownership has no appreciable relationship to citizens' awareness of important public affairs. Most people who have watched

competing news broadcasts on a single evening would surely agree. This sort of programming is one of the most uniform commodities on the air.17

There is, moreover, a different argument, that deserves far more consideration than it has received, that cuts against counting diversity of public affairs programming as an authentic public good. Taking the point of view of the scrupulously community-regarding republican who would have citizens bear costs for the common welfare, it is not at all obvious that having television coverage dominate public affairs is desirable. After all, a little learning is said to be a dangerous thing, and a "sound bite" is about as little learning as one can have about anything. It seems likely that those who wish to become informed about serious subjects will derive their opinions primarily from reading books, magazines and newspapers.

Moreover, even if television is an appropriate medium for covering public affairs, there are cheaper and more effective ways to ensure that many points of view are heard than by means of ownership diversity. Multiplicity of ownership is a blunt instrument, and (if the economic

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17. But see Matthew L. Spitzer, Justifying Minority Preferences in Broadcasting, (preliminary draft of May 17, 1989)(quoted with permission), (existing data are consistent with possibility that race/sex diversity in ownership fosters increased programming of interest to minorities and women). Assuming arguendo the correctness Spitzer's conclusion, he addresses a matter that is only peripheral to the problem central to this paper.

literature is correct) possibly a counterproductive one for achieving this objective. The point here is that independent owners, all with identical economic incentives, may produce relatively uniform products. There is nothing special about broadcasting that produces this result: Time and Newsweek -- owned and produced by entirely different people but both chasing the same customers -- look so much alike that one is no longer surprised by their frequently coincident covers. Few people put such confluences of behavior down to conspiracy. Still, the uniformity can hardly be called accidental.

The great majority of those who operate broadcast stations would appear to be driven by profit incentives rather than by the desire to mold public opinion and attitudes. Anyone who is likely to attract a decent audience will probably be able to induce a station to let him on the air, and so will obtain access to the television-watching or radio-listening public. There is reason to believe, moreover, as we discussed above, that if multiple stations were all held by one entity, access by marginal speakers might actually be improved. In short, access diversity is simply a version of what we call program diversity -- entertainment and public affairs programming that is most desired by various different segments of the television-watching public.

D. Can More Diversity Be Bad?

Program variety is not a value in and of itself. If everyone had exactly the same tastes in programming, variety would be bad rather than good. In such a world diversifying programming in the sense of increasing the number of distinct "pitches," to adopt Noam's terminology,18 would merely dilute the investments per program. This would diminish the quality of the one program that was everyone's first choice. Variety is valuable only because people are different. But that means that it is important to appreciate how people are different.

In one sense it would contribute in no important way to the diversity of Chicago's radio market if there were stations broadcasting in Basque and Urdu, because practically nobody in Chicago can understand these languages. That sort of diversity, completely empty of relationship to human desire, is too trivial to bother with. Conversely, a sixty-channel cable system might actually maximize diversity, in a non-trivial sense, if it carried sixty different basketball games simultaneously, rather than basketball on one channel, movies on another, weather on another, news on another, and so on. People do distinguish among basketball teams, often following the travails of "their" team or league and ignoring all the others. Sixty

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18. Eli M. Noam, A Public and Private-Choice Model of Broadcasting, 55 PUBLIC CHOICE 163 at 177 (1987).

games at once will involve 120 teams, so nearly everybody would have the chance to see "their" team play. Now if it happened that the first choice of all television viewers at a particular hour was to watch "their" basketball team play, whatever else might be available on television, whether it was as meritorious as "Sixty Minutes," as escapist as "Gone With the Wind," or as obscure as "Tonight in Anatolia," would make no difference. It could not contribute to diversity in any meaningful sense if no one wanted to watch. The differences among people's second choices are irrelevant unless their first choice is absent.

Few people would question, we suppose, that in a two-station market, one would ordinarily have more diversity if one channel showed, say, a high-brow program like Nova while the other channel showed a mud wrestling contest, than if either program were simulcast on both stations. A menu of two entirely different kinds of program, in other words, produces a certain kind of diversity. What may not be so obvious, however, is that the same "kind" of program offered with different production values also constitutes a sort of diversity as well. For example, celebrity mud wrestling and amateur mud wrestling surely count as "diverse" products (provided that the celebrities really are celebrities). This second facet of diversity has been called quality variation.

The likelihood of getting celebrity rather than amateur mud wrestling (better rather than worse quality of this kind

of entertainment) is dependent on stations' ability to generate sufficient revenues to pay celebrities to engage in such a mortifying spectacle. This means, as Wildman and Lee have shown,19 that there is a tradeoff between pitch -- that which distinguishes Nova from mud wrestling -- and "quality" -- that which distinguishes celebrity mud wrestling from amateur mud wrestling.

In much the same vein, precisely the same program offered at alternative times provides diversity, because the various individuals of any given taste for pitch and quality have differing schedules for non-viewing activities such as work or alternative recreation. But holding all else equal, more re-runs simultaneously mean less variation in pitch, but higher quality of production.20 Can an office-bound scholar or bureaucrat actually expect to ascertain optimal trade-offs among the various facets through the application of pure theory?

There is an additional complicating crosscurrent, suggested by Eli Noam's observation that more diverse offerings on commercial television will tend to crowd out -- or rather crowd up -- high-"pitch" public television offerings. (Conversely, more numerous high-"pitched" public television offerings will tend to mediocritize -- crowd down

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19. Steven S. Wildman and Nancy Y. Lee, Program Choice in a Broadband Environment (manuscript)(1989).

20. Ibid at pp. 5-10.

-- commercial television offerings.)21 Noam's proposition can be cast into a more general form: under the constraint of scarcity, more of one good will mean less of whatever kinds of goods are substitutes for it. Thus "more" television will translate into "less" of something else -- probably books, records and movies, assuming that these are substitutes for television -- whether "more" and "less" refer to volume, to quality, or to whatever other characteristic.

III. THE THEORY'S NEED FOR AN EMPIRICAL CRUTCH

We propose both to account for the neglect of the intermediate possibilities for structuring the broadcasting market and to suggest a sensible way around the problem. The intermediate possibilities have not been discussed previously in the literature because no one, us included, has a model of diversity optimization that is remotely capable of capturing the values, or even the meanings, of the various abovementioned forms of diversity,22 let alone predicting their interaction. Indeed, to take a very simple instance, nobody has a model that can tell what would happen to any single aspect of diversity if each of four firms

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21. Eli M. Noam, A Public and Private-Choice Model of Broadcasting, 55 PUBLIC CHOICE 163 at 177 (1987).

22. Cf. Steven Garber, The Economics and Political Economy of Broadcasting: Challenges in Developing an Analytic Foundation -- A Comment on the Noam Paper, 55 PUBLIC CHOICE 189 (1987).

owned five stations, still less what would happen under more complicated variants.

In this sort of world, only Austrian economists and other doctrinal agnostics would be entirely at home. One might have expected that neoclassical economists, if they were to be true to their school's creed, would have seen that there were more variables than defined equations, even if they were not troubled by the suspicion that there was no way to observe or even make sensible guesses about some of the embedded variables. After the theory has bottomed out, dealing with the problem of diversity optimization empirically would appear to be the only sensible course.

But the FCC's rules actually forbid the variation that would be necessary in order to run such an experiment. Assuming a given state of facts, how the FCC will interpret and apply its anti-monopoly rule can be foretold exactly. If a commercial applicant for a TV license already operates a television station in that same market, that applicant will not be given permission to operate a second channel -- no matter what.

Numerous different experiments might be run to ascertain which local market structure might optimize meaningful program diversity. There are m markets in this country with at least n channels. In markets with twelve channels, for example, the structure of local ownership can

assume any one of 72 possible configurations. Why not allow different firms to operate multiple channels?

Of course one would prefer to have a very much larger number of markets in which to run experiments than the present world supplies. We are, unfortunately, stuck with the sample that we're stuck with, which limits the amount of information an experimenter can extract. And so, just because we could learn (for example) what Seattle would look like with a complicated multiple owner-single owner industry structure, it does not necessarily follow that we could use that information to tell us what the whole world would look like with an analogous structure. For one thing, that whole world includes networks, whose provision of programming nationally is unlikely to be sensitive to variations in the ownership structures in one or only a few markets. For such reasons, experiments of the sort we envision undoubtedly would generate far less relevant information than we would like to have. But they would give us more than we have now -- with seemingly little sacrifice involved in getting it, given that restrictions on the supply of advertising are imposed by the FCC and the NAB without regard to local market concentration.

One obvious metric could readily be utilized to compare the performance of various distinct local market structures: Do people watch more TV or less, ceteris paribus? This criterion of performance has several virtues. For one thing

it is easily measurable, while directly measuring people's welfare is impossible. Furthermore, it does not require one to take a position concerning whether it is better for people to watch more television or less. The optimand can be located on either behavior.

IV. BRIGHT LINE RULES

The silent protagonist of most of the literature that follows Steiner is the publicly interested regulator.23 Such an individual ought to want a rule that would permit such experiments to be run. A rule of this sort would be different in kind and not merely in content from the present anti-monopoly rules. The existing anti-monopoly rules are bright line rules which, by their nature, convey benefits and impose costs that will vary from situation to situation. The desirable ex ante specificity, or brightness, of legal rules will depend on the environment in which they are to operate. We think bright line anti-monopoly rules are inappropriate tools for the publicly interested regulator to use when awarding rights to utilize electromagnetic

23. Those who work in the public choice idiom are wary of the entire concept of regulators seeking "the public interest." They fear that such fuzzy objectives can be easily subverted into schemes to magnify the importance of the people who run the agency or to enhance their opportunities to extract concessions from the members of the regulated industry. See, e.g., James M. Buchanan and Gordon Tullock, THE CALCULUS OF CONSENT (1962); George J. Stigler, The Theory of Economic Regulation, 2 BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 3 (1971); Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 JOURNAL OF LEGAL STUDIES 101 (1987).

spectrum. One wonders, indeed, why the FCC selected a bright-line rule of this kind. Not only would a highly discretionary rule have done better on the merits, it would also have accorded with the predictions of public choice theorists, who believe that regulators, for unmeritorious reasons of their own, tend to prefer fuzzy rules anyway.24

It is a commonplace, almost, that "hard-edged rules . . . are what property is all about."25 It is psychologically desirable to know, where possible, what one has and what one doesn't. And economically, a condition precedent to moving resources to higher-valued uses is that somebody be entitled, and have a private incentive, to move them. But one of the most pronounced advantages of the administrative process is that as a practical matter it allows questions of entitlement to be addressed and, at least provisionally, to be determined, at a fairly early point in their existence, before many resources shall have been devoted to their creation. In short, precisely where the Commission has constrained its own discretion with a bright-line rule, one would expect it to have reserved the greatest amount of flexibility.

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24. Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 JOURNAL OF LEGAL STUDIES 101 (1987).

25. Carol M. Rose, Crystals and Mud in Property Law, 40 STANFORD LAW REVIEW 577 (1988).

Consider, for illustration, the situation of Lima, Ohio, a small market with three commercial allocations, one of them on the air and the other two dark.26 Given various scale economies, it is probably the case that, even if no one else could profitably operate those dark allocations, the existing licensee could do so. Few informed observers would have any doubt, however, that if the existing licensee were misguided enough to apply to operate those dormant channels or either of them, the FCC would deny permission. But such a denial by the FCC would amount to preferring "simplicity and clarity" to "diversity" -- one of the main supposed purposes of the rule.

Clarity and simplicity in rules leads to predictability in their operation, which in turn affects the

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26. The reason that available channels in Lima are dark is easy to appreciate. A new station would have to duplicate the operations of the existing licensee, but the revenues available in a town the size of Lima are insufficient at present to support that duplication, although that may change eventually.

In contrast, with waiver of the FCC's anti-monopoly rule, the existing licensee in Lima could put additional channels on the air at modest cost, just sightly more than the cost of acquiring additional transmitters and the power required to operate them. Although there is a minimum viable capacity for a television studio, the bulk of any channel's airtime consists of programming or advertisements that are supplied from elsewhere, typically by one of the national networks. Consequently in small markets, onsite studios and their operating personnel are often idle (or underemployed) much of the time, or are employed in ways that cannot take full advantage of their specialized attributes. Hence any local programming at a second channel in Lima would likely require no new studio capacity and relatively few new employees. Similar remarks apply to the station's tower, marketing, and so on.

risk premium that an investment in a regulated resource will command. This may be an argument for bright line rules in many circumstances, but not here, where very little needs to be invested until after the right to operate has been determined.

To illustrate: in the year 1491, it would have been impossible to decide ("assign") what property Columbus would be entitled to claim in the name of the Spanish Crown. When he discovered land where the Orient was supposed to be, did Columbus discover (1) a beach; (2) a beach and an island; (3) a beach and an island and a nearby continent; (4) a beach and an island and both adjacent continents, or (5) all of the above plus all outlying and thitherto undiscovered islands (undiscovered by white people that is) such as Hawaii and New Zealand? Without knowing what there was to be discovered, it would have been difficult to crystalize a first-order rule of property allocation.

But some second-order rules -- standards -- might have been clearly stated. For example, conventions might have established an upper limit on what Columbus could claim by looking to the net expected value of the trade route that he was trying to find (i.e., the present value discounted by the probability of finding it, net of the costs of trying). Anything in excess of that value would be windfall or rent -- something in excess of the value necessary to call forth the resource (three ships and their crew) in a timely

fashion in the first place. Another second-order rule society might adopt: do not choose a rule that will influence people prematurely to invest resources in discovery and development. Whatever the value of the rule of first come, first served for cafeterias or water fountains, it is seldom a good one for developing land.27 Still another second-order rule, that some scholars suggest to be a general tendency in the legal system, is a wealth-maximization principle. Under this principle, today's parties can expect tomorrow's courts to specify entitlements after the fact according to the rule that would have maximized wealth had it been in place before the fact. If courts succeed in embedding that expectation, then the parties, in reliance on that expectation, will behave in a way that does maximize wealth.

Imagine a business investment that will require a series of capital outlays over time: at first, just thinking about it; then thinking about it seriously; then hiring a consultant; then a lawyer; then an engineer; and so on and so on through actual construction of a building and purchase of electricity for it; until finally one has made appropriate investments in "good-will" and the other intangible capital necessary to get the business up and running profitably. The earlier in this process that

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27. David D. Haddock, First Possession Versus Optimal Timing: Limiting the Dissipation of Economic Value, 64 WASHINGTON UNIVERSITY LAW QUARTERLY 775 (1986).

entitlements can become legally unambiguous, the more nebulous may be the rule used to determine those entitlements. Conversely, the later that entitlements are adjudicated relative to the stream of investments, the harder-edged the rules that govern entitlement specification must be in order to optimise the amount of investment. Put differently, when entitlements can be sorted out early in the process of investment, the rule whereby these are determined can be more particularized and less general than when a great deal of capital must already be in place before entitlements can be awarded.

Getting a television station on the air in the first place is something that lends itself peculiarly to the use of fuzzy rules, because the entitlement to reap the flow of benefits from operating the station is determined -- actually litigated in a sense -- before the bulk of the investment is made. Indeed, one is required to obtain a construction permit before erecting plant; and the construction permit represents an administrative finding that (assuming technical standards can be satisfied), the permittee prima facie qualifies to receive a broadcast license.

The now-defunct fairness doctrine makes for a contrasting case. This was a set of nebulous rules for determining entitlements, but one that did not swing into action until much if not all of the required resources had

been sunk. While the fairness doctrine prevailed, it was impossible for a licensee -- for anyone, really -- to know whether certain programming violated it or not prior to the programming being conceived, written, produced, and at least tentatively situated in a context of other programming. By then, much investment would already have been committed. The fairness doctrine, therefore, was an instance in which a highly specific rule was called for, so that one could know as early on as possible what programming would and what would not violate the doctrine. No one could know in any specific way what a "fairness" rule requires: the FCC idea of "fairness" -- "reasonably balanced coverage of a controversial issue of public importance" -- was an attribute of programming already in being and in context, without an abstract existence. It follows that the fairness doctrine, a rule both fuzzy in content and requiring "late" application, must have discouraged licensees' investments in programming. The FCC has now, appropriately in our view, moved to a bright-line alternative -- there is no fairness doctrine any more.

V. CONCLUSION

The literature following Hotelling and Steiner has revealed the difficulties that must face a public interest-regarding regulator who attempted to select an industry structure to optimize programming diversity. There has also been developing in parallel a literature that offers clues

about why these difficulties exist. Diversity is a multi-faceted concept. Reducing it to one dimension, as the Hotelling-Steiner literature implicitly does, makes the theory of what is the best industry structure seem a misleadingly tractable problem. According to our argument, the family of Hotelling-derived theories have gone as far as they can go without an infusion of data. We have argued that those data could be produced easily and cheaply by the FCC if they changed their anti-monopoly rules to make them fuzzier and more standard-like.

Existing theories of regulatory behavior do not predict that the FCC would hesitate to tinker with local ownership structures in order to find out which among the many possibilities between monopoly and maximal competition might do the best job. Indeed, despite a literature that mostly predicts the contrary, one cannot rule out the possibility that there might not be much difference between the two poles at all,28 but under the present rules no one will ever know for sure.

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28. In eighteen of thirty-six cases ("cells") which represent different combinations of assumptions about scale economies and the preference distributions and availability of potential audience, Beebe finds that it is ambiguous whether monopoly does a better job than competition (or the other way around) in generating total surplus. In four other cells, he concludes that monopoly and competition would be equivalent surplus generators. Even in the fourteen cells where there is a clear winner (where there is a clear winner, invariably it is monopoly), one cannot tell the magnitude of the social benefit, nor whether it is of any real significance. Jack H. Beebe, Institutional Structure and Program Choices in Television Markets, 91 QUARTERLY JOURNAL OF ECONOMICS 15, 29 (Table V) (1977).

An additional puzzle, one that we have not been able to unravel, is thus suggested. The question is why has the agency -- and for that matter why has the literature -- hesitated to propose this sort of experimentation for the spectrum of broadcast services?29 One would expect it to be otherwise, for example, if the public interest hypothesis of agency behavior generally explained the FCC's conduct. That theory states that administrative agencies are meant to maximize aggregate community welfare in industries too complex for Congress to regulate directly.30 But an agency cannot adequately manage a complex industry if it refuses to gather crucial data on subjects that lie beyond the predictive power of presently available theories, where only empirical investigation can avail.

Similarly, none of the various special interest theories of administrative agency behavior seem to predict the robustness of the FCC's multiple ownership rules. For

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29. Indeed, the agency is now doing just that in connection with a sliver of new spectrum now in the process of being added to the AM band. See, Notice of Inquiry, AM Broadcasting in the 1605-1705 kHz Band, 53 FED. REG. 23, 426 (June 22, 1988). Similarly, multiple ownership rules do not apply to low power television stations, which are supposed to reach audiences only within a few miles of the transmitter. Those relaxations of the FCC's anti-monopoly rules, however, are nothing like the experiment we envision, because these services may not be viable as important providers of entertainment and information programming within their areas of service, and certainly will have minimal influence on the producers of mass-consumption programs.

30. T. Barton Carter, Marc A. Franklin, and Jay B. Wright, THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA (2d ed. 1989) 32-33.

example, the economic theory of regulation31 implies that agency actions can be interpreted either as attempts to cartelize a favored group of firms (at the expense of consumers), or as a means of injuring the competitors and potential competitors of the favored group.

But one would think that an agency-as-cartel-office would be quite hospitable to the possibility of various local ownership structures, each of them less competitive in the advertising market than the present configuration. Just because these configurations might be good for consumers, they would not therefore be bad for the "cartel members" (broadcast licensees). Other things equal, more advertising is usually thought to translate into less (and less advertising into more) welfare for television viewers.32 Furthermore, it would be surprising to learn that those whose interests might be injured if the proposed experiments were carried out -- chiefly advertisers and certain program suppliers -- possessed more clout with the agency than do licensees.

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31. George J. Stigler, The Theory of Economic Regulation, 2 BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 3 (1971).

32. See, Docket No. 18110, Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 FCC 2d 1046, 1113 (1975)(Separate Statement of Commissioner Glen O. Robinson).

Finally, Fred McCheaney's rent extraction hypothesis33 seems inconsistent with the agency's unwillingness to experiment with local market ownership structure. McCheaney asserts that public servants behave like profit-maximizing entrepeneurs rather than altruists, constantly inviting bids from those who may be affected by matters within regulators' official discretion. But if an agency (or Congress -- or anyone) is going to extract rents, it must signal its willingness to waive its rules, or change them, or reinterpret them, or ignore violations of them. Flat-out unwillingness to entertain deviations from bright-line rules -- the FCC's posture with respect to its one-to-a-market rules -- is the last thing a McCheaneyite would expect.34

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33. Fred S. McCheaney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 JOURNAL OF LEGAL STUDIES 101 (1987).

34. For the purposes of the present discussion we ignore two other widely held hypotheses that purport to account for why agencies act as they do: the squawk-reduction hypothesis and the mistake hypothesis.

The squawk-reduction hypothesis says that the agency will act in such a way as to minimize the total amount of public and private and congressional (etc.) squawking to which it must attend. This hypothesis, a favorite of Washington's press corps, is empirically empty in the absence of a way to quantify "squawk" -- indeed, without such a metric, the theory is quite probably consistent with every known state of the world, is non-falsifiable, and therefore is trivial.

The mistake hypothesis, probably a variant of the public interest hypothesis, explains agency deviations from what public interest analysis would predict as instances of cognitive failure by decisionmakers within the Commission. This hypothesis can also be employed to explain every possible state of the world; hence it predicts none.

In brief, we have no good explanation for the Commission's evident rigidity of views respecting local market structure. Historically, Commission attempts to regulate the ownership structure of local markets began with the chain broadcasting rules of 1941.35 Those rules were premised on facts whose continued vitality (even assuming their correctness at the time) is questionable as a reason for the continued application of the Commission's structural regulations.36

Estranged both from the facts that prompted their creation and from regulatory justifications of other kinds, the rules restricting the structure of local television markets to their present traditional conformation ought to be adjusted.

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35. 47 C.F.R., Sections 73.132; 73.232; 73.658.

36. Mutual Broadcasting blamed its difficulties on the dominant position of its rivals CBS and NBC -- especially NBC, the then-proprietor of two radio networks. At a time when few cities had more than three radio stations, the potency of an established competitor, especially one with the ability to tie up two frequencies singlehandedly, is a very different matter from what one sees today in either radio or television. Today, even cities of modest size have more independent television stations than network affiliates, and thirty or more cities have at least nine allocated television channels.